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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-526

LOCAL 1104, COMMUNICATIONS
WORKERS OF AMERICA,
AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
and WELLINGTON G. RIGBY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT RIGBY IN OPPOSITION

RAINS, POGREBIN & SCHER
210 Old Country Road
Mineola, New York 11501
516-742-1470

FREDERICK D. BRAID

Of Counsel

ABS DUPLICATORS, INC.–1732 Eye Street, N.W.–Washington, D.C.–298-8837

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QUESTION PRESENTED

Can a union insist on the discharge of an employee who duly tenders dues in accordance with the terms of an agency shop union security provision, but is denied membership in the union for having engaged in protected section 7 activity and thereafter refuses to tender dues unless he is admitted to membership?

STATEMENT

Wellington G. Rigby is an individual who has been in the continuous employ of the New York Telephone Company (Telco) since July 6, 1948. During his 27 years of satisfactory service with Telco, Rigby has periodically been a member of labor organizations representing employees of Telco. For the past several years Rigby has been working at Telco's Bellmore facility, within the jurisdiction of Local 1104, Communications Workers of America, AFL-CIO (Local 1104), the exclusive bargaining representative for these employees of the company. On or about May 1969, Rigby became a member of Local 1104 and remained a member in good standing until on or about July 7, 1971, at which time he duly resigned therefrom in accordance with Article 33 of the collective bargaining agreement then in effect between the Communications Workers and Telco.[1]

[1] In this collective bargaining agreement, which is the one immediately preceding the agreement containing the agency shop clause at issue herein, there was a maintenance of union dues provision in article 33, which provided as follows:

> 33.01 Each employee who is a member of the Union:
> (a) on or about the beginning of his employment or
>
> (b) on or after May 22, 1967, the effective date of this Agreement,
>
> whichever is the latest, shall, as a condition of employment pay or tender to the Union an amount equal to the periodic Union dues until the final termination of this Agreement, *except that each such employee may, within the 10-day period immediately preceding the termination date of this Agreement terminate his obligation to tender periodic Union dues to the Union*

(continued)

Rigby's resignation preceded the lengthy strike by the Communications Workers against Telco, which began shortly thereafter and continued into early 1972. Although Rigby had validly withdrawn his union membership, he did not work during the Communications Workers' strike against Telco and returned to work only after the strike had been settled. Upon his return to work following the strike, dissatisfied with the representation given the employees by the Communications Workers, Rigby solicited support for the Teamsters from among members of the bargaining unit represented by Local 1104. He was not a member of any labor organization at this time, and was not required as a condition of continued employment to be a member of any labor organization, and engaged in this activity during the Spring of 1972. After a brief period of activity on behalf of the Teamsters, Rigby ceased all such activity and sought to rejoin Local 1104 and take an active part in union affairs affecting his livelihood. On or about July 26, 1972, after Rigby had stopped organizing for the rival union, he submitted an application for membership in Local 1104. His membership application was denied solely because he had engaged in organizing for a rival of the Communications Workers (A10, A53-54, A82)* even though he was not a member of the Communications Workers or any other labor organization at the time of his solicitation of support for the Teamsters.

[1] (continued)

> *as a condition of employment by notifying both the Union and the Company of his withdrawal from membership in the Union.* (Emphasis added.)

* References to the Joint Appendix in the Second Circuit will be denoted A ____.

In the newly negotiated collective bargaining agreement between Telco and the Communications Workers, which ended the strike, there was, for the first time, an agency shop provision which replaced the previous maintenance of union dues provision.[2] Notwithstanding Local 1104's denial of union membership to Rigby, the union insisted that Rigby pay the equivalent of union dues under the agency shop provision of the contract. Rigby tendered dues on the condition that he be accepted as a member of Local 1104 and executed a payroll deduction authorization for union membership dues (A68). Refusing to accept dues from Rigby as a member, Local 1104 thereafter requested that Telco terminate his employment for failure to pay an agency fee, which in fact was equivalent to the union's dues.

The reason for Local 1104's continued refusal to give Rigby membership rights is the organizing activity which he engaged in for the Teamsters *while he was not a member, and not required to be a member,* of the Communications Workers or any other labor organization in the Spring of 1972. Rigby has at all times been, and still is, ready,

[2] Article 33 of the agreement in question provides for an agency shop as follows:

> 33.01 Each regular employee shall, as a condition of employment, pay or tender to the Union amounts equal to the periodic dues applicable to members for the period beginning 30 days after hire or 30 days after February 17, 1972, whichever occurs later, until the termination of this collective bargaining agreement, except that an employee may terminate this condition of employment by giving a written individual notice to the Company and the Union of such termination by certified or registered mail, return receipt requested, and postmarked between July 8, 1974 and July 17, 1974, both dates inclusive.

willing, and able to pay all validly required dues and initiation fees upon his acceptance as a member of Local 1104. He has likewise been willing to support Local 1104 as a member with undivided loyalty upon his acceptance as a member, as he did between 1969 and 1971. He meets all of the eligibility requirements for union membership set forth in the Communications Workers' Constitution and the by-laws of Local 1104 (A57, A63-64), and has never been charged with, tried, fined, suspended or expelled by Local 1104 for any union offenses while a member of that organization.

ARGUMENT

Although this case appears to present a significant question left unresolved by this Court in the *General Motors*[3] case, careful examination of the facts in this case, the legislative history of the National Labor Relations Act and its amendments, and the national labor policy, make it plain that the decision of the Second Circuit is correct. Indeed, the issue left unresolved in *General Motors* was advanced by the company in that case in an effort to have this Court declare the agency shop to be illegal. The Court did not have to reach the issue and upheld the validity of the agency shop. It is somewhat ironic that the union in the case at bar is trying to uphold the very issue that was originally used in an effort to defeat the legality of the agency shop. Moreover, there is no conflict of decisions on the issue presented herein and the likelihood is that a similar set of facts will not present itself again.

[3] NLRB v. General Motors, 373 U.S. 734 (1963).

I

The Decision Below is Clearly Correct

As the Second Circuit correctly noted, it was faced in this case with a problem that was not specifically considered by Congress when it enacted the Taft-Hartley amendments to the National Labor Relations Act which provided for union shops with certain safeguards (PA3a).* The obvious reason for its not being specifically considered by Congress is that no one has ever seriously entertained, in this country, the notion of taxation without representation, which is precisely what the union seeks in this case. So foreign to all American political thought is this throwback to Revolutionary days that Congress' deliberations naturally presumed no such concept, and indeed some of its reflections strongly indicate as much. The Second Circuit's "extrapolation" from the statutory language struck a proper balance between the competing interests involved, providing a well reasoned determination which the petitioner herein shows no valid reason for reviewing. In fact, it is almost inconceivable that this Court would entertain a case for taxation without representation as the nation approaches its bicentennial.

1. The Second Circuit did not misconstrue section 8(b)(2) when it held that such section prohibits Local 1104's seeking the discharge of Rigby after he tendered dues, his tender was denied unless he would waive membership rights, and thereafter refused to tender dues unless and until he is admitted to membership. Sections 8(b)(2) and 8(a)(3) speak very clearly to an employee's obligation to:

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* References to the appendix accompanying the petition herein will be denoted PA____.

> tender the periodic dues and the initiation fees uniformly required as a condition of *acquiring or retaining* membership.

Nothing could be clearer. There is no requirement that dues and initiation fees be tendered if it does not enable an employee to "acquire" or "retain" union membership. Nowhere does there appear any support whatsoever for the naked claim, at page 16 of the petition, that Congress "plainly intended to allow the imposition of such [job-related] sanctions for nonpayment of dues even where union membership has been denied."

As petitioner correctly notes, the union security amendments were aimed at curing the evils of compulsory unionism. With the closed shop, union membership was a condition precedent to a job. Before an employer could hire an employee, the employee had to be a member of the union with whom the employer had a collective bargaining agreement; even if he were a member at the time of hire, he had to maintain that membership to retain his job.

The amendments prohibited the closed shop, compulsory unionism, requirement of union membership as a condition of employment; they permitted an employer to hire anyone, but allowed the union to negotiate a provision that would require union membership after thirty days of employment. Then, to safeguard against circumvention of the prohibition of making employment contingent upon union membership by technical compliance with the amendment followed by expulsion from the union, Congress severely restricted the grounds upon which a union could seek the discharge of an employee who was not a union member. While permitting the

unions to require union membership as a condition of continued employment beyond thirty days, it was very careful to provide that if the union expelled a member it could not be the ground for automatic discharge, as it would have been under a closed shop, unless the reason for explusion was the employee's failure to meet the union's valid initiation fee and dues requirements. The references, therefore, to delinquencies in dues and initiation payments in the italicized portions of the quotes on page 14 of the petition indicate the requirements of an employee *while a union member.*

There is no discussion whatsoever about any requirements to pay dues or initiation fees after the union relationship has been severed, for whatever reason. The key is the expulsion triggered by dues delinquencies; it is the failure to pay an initiation fee or dues which gives the unions a right to deny or revoke membership and then insist that such an employee be discharged because he has not maintained his union membership in accordance with a valid union security provision in a collective bargaining agreement. This is patently clear from a portion of Senate Report No. 105 conspicuously omitted from Appendix D of the petition. As the report described section 8(b)(2):

> The labor organization may not persuade or attempt to persuade the employer to discriminate against an employee except for two reasons: First, that the employee has *lost* his union membership by failing to tender the dues or initiation fees uniformly required as a condition of membership; second, that the employee, at a time when the Board would not entertain

> a petition to determine representation pursuant to section 9(c)(1)(A), has engaged in activity on behalf of another labor organization or in activity having as its objective the termination of the exclusive representative status of the union.[4]

Eventually, Congress rejected the "second" reason, which was an attempt to restrict an individual's section 7 rights. Significantly, nowhere is there any indication, any hint whatsoever, that a union can seek the discharge of an employee who refused to pay an initiation fee or dues after being denied membership. Again, the reference to delinquencies is always in the context of denial or revocation of membership which justifies seeking the discharge of an employee. As Senator Taft stated:

> The pending measure does not propose any limitation with respect to the internal affairs of unions. They still will be able to fire any members they wish to fire, and they still will be able to try any of their members. All that they will not be able to do, after the enactment of this bill, is this: If they fire a member for some reason other than nonpayment of dues they cannot make his employer discharge him from his job and throw him out of work. That is the only result of the provision under discussion.[5]

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[4] S. Rep. No. 105, on S. 1126, 80th Cong., 1st Sess., p. 21, 1 Legislative History of the Labor-Management Relations Act of 1947, p. 427, (emphasis added).

[5] *Id.* at 1097.

With respect to desired but unavailable membership, earlier comments of Senator Taft indicate that the dues delinquencies ground for seeking discharge was only for those employees for whom union membership was available and that there was no contemplation of dues payments from those to whom membership was denied:

> But the only effect of this provision is that there may be a union shop, but if the employees do have a union shop, they cannot compel the employer to fire a man because the union will not admit him.
>
> Let us take the case of unions which prohibit the admission of Negroes to membership, they may continue to do so; but representatives of the union cannot go to the employer and say "You have got to fire this man because he is not a member of our union."
>
> So, also, if a union fires a man for some reason other than nonpayment of dues: If the employee is willing to pay his dues to the union, then the union cannot compel the employer to fire him because he is no longer a member of the union, through some action of the union in expelling him. That seems to be only common sense and common justice.
>
> There seems to be some argument for abolishing the union shop. Personally, I do not think we ought to go that far, because it is an established custom and practice in many industries and has been for many years. But I do think where it is permitted, the unions

> should be required to let all employees join the union and continue to be members of the union as long as they continue to pay their union dues.[6]

There is a clear distinction between the situation where membership is not available and where it is available. It is equally clear that the concern over dues payments applies to employees for whom membership is available. The quoted material, at pages 15 and 16 of the petition, concerning *expulsion* from membership must likewise obviously be viewed in this context.

It is important to remember that Rigby was denied membership notwithstanding his tender of dues. To this very day, he still meets, as he always has, all eligibility requirements set forth in the Local 1104 by-laws and the Communications Workers' constitution. He always has been and still is willing to pay dues and required initiation fees upon his admission to membership. Rigby clearly is not a free rider, one trying to avoid dues payments while reaping the benefits of union membership; he is an outspoken critic who is willing to pay the freight, but is being denied a voice in union affairs while being asked to pay for the union he wants but cannot join.

There can be no doubt that the Second Circuit's construction of 8(b)(2) as limiting a union's right to seek the discharge of an employee to situations where membership is available and required and the employee refuses to tender dues is correct.

2. The Second Circuit's holding that Local 1104 violated section 8(b)(1)(A) by seeking to compel Rigby to

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[6] *Id.* at 1096.

pay dues while simultaneously denying him membership for engaging in protected activity is also clearly correct.

Although it is not before this Court, the General Counsel's refusal to issue a complaint on Rigby's behalf against Local 1104 under 8(b)(1)(A) for its refusal to admit him to membership was wrong. Indeed, it was clearly inconsistent with the companion case before the Second Circuit wherein the General Counsel issued a complaint on behalf of a number of Telco's employees who were denied membership because they refrained from striking and crossed picket lines at a time when they were not members of Local 1101 in that case. Rigby, who had duly resigned from Local 1104 before the strike, began to organize for a rival union at the conclusion of the strike. At this time, he was clearly not a member of Local 1104; he was clearly not required to be a member of Local 1104; and he stopped engaging in these activities prior to making application for membership in Local 1104. He was clearly not engaged in dual union activities; he had given his support to one union at a time and never to both unions at the same time. The error of the General Counsel should not be compounded by ignoring the facts upon which his decision was based, even though that decision is not before this Court for review.

It is very clear, contrary to the assertion at page 17 of the petition, that there is no "well settled law that organizational activities on behalf of a rival union are not protected against union disciplinary action such as expulsion or exclusion." While expulsion may be permissible in such circumstances, expulsion followed by an attempt to compel dues payments is another question — and not the one that is being put before the Court on this petition.

There is not one case anywhere which holds, or even suggests, as the petition nakedly claims, that a union may exclude from membership an individual who has previously supported another union. Only the General Counsel's refusal to issue a complaint against Local 1104 for its failure to admit Rigby to membership for engaging in protected section 7 activity suggests such a right, which, it is submitted, is wrong and even inconsistent with other determinations of the General Counsel, as noted *supra*. Rigby was never disloyal to Local 1104 because all of the activity about which the union complains occurred at a time when he was not a member and had no loyalty to Local 1104. Requiring him to pay dues under such circumstances is clearly coercive, as the Second Circuit found, discouraging, as it does, protected activity.

The suggestion, at page 18 of the petition, that "disgruntled employees may be *encouraged* to avoid having to pay dues by committing acts which make it intolerable for their unions to *continue them as members*" (second emphasis added) is unfounded speculation. To begin with, Rigby was not a Local 1104 member when he engaged in protected section 7 activity, and it is this *nonmember* activity which the union is wrongfully and coercively trying to reach. Insofar as the union's concern over truly disloyal activity of its members and continuation of such membership, it has ample protection in the disciplinary proceedings and penalties provided for in its constitution. What it is seeking to reach here, and what the Second Circuit correctly found violative of 8(b)(1)(A), is the actions of nonmembers. It is attempting to secure the right to punish nonmembers for engaging in protected activity by denying them union membership

while forcing them to pay union dues which they have no obligation to pay as nonmembers.

3. The Second Circuit correctly applied the Court's decision in *General Motors* to the situation in the case at bar. It correctly noted this Court's observation in approving the agency shop that such a provision places the option of membership in the employee and is therefore a lesser form of union security than the union shop approved in the Taft-Hartley amendments and is, therefore, *a fortiori* permissible. Throughout these proceedings, the union has pressed the position which was pressed in the *General Motors* case by the company in an effort to defeat the agency shop, and which this Court avoided, as noted at 373 U.S. 744 n. 12, in upholding the agency shop. Although the question of desired but unavailable membership was not specifically addressed by this Court, the Second Circuit correctly addressed the issue and reached a result consistent not only with *General Motors*, but also with this Court's earlier decision in *Radio Officers.*[7]

Local 1104 attempts to accomplish its onerous result by perverting the concept of "financial core" membership. Originally, "financial core" membership was the accomodation struck to balance an employee's first amendment rights against the unions' "membership" entitlements under a valid union security provision. The intent of Congress in approving union shops was satisfied so long as the unions' complaints about "free riders" were satisfied. Therefore, even though membership might be available to an employee, all he need do to comply with a union

[7] Radio Officers Union v. NLRB, 347 U.S. 17 (1954).

security provision is pay dues. Local 1104 seeks to convert this accommodation to individual rights to a device which enables it to offer the accommodation left to the employee's option.

In other words, Congress, which was even considering outlawing the union shop, eventually relented to organized labor's concerns about free riders and authorized certain union security provisions that would enable it to require union membership and financial support. The employee's first amendment rights were protected by construing this membership obligation as limited to tender of dues required of members.[8] Now, the union contends that it is only obligated to offer "financial core" membership as the *quid pro quo* for dues. As the Second Circuit very cogently observed:

> The argument urged on us by the locals in this case would in effect read the notion of a reason other than the failure to pay dues out of the Act, and thereby eliminate the Congress' carefully placed wedge against compulsory unionism. For by definition, under the locals' scheme, there can be no reason for the denial of financial core membership except the failure to pay dues, since financial core membership means nothing more nor less than the fact that an employee pays his dues. We hold, therefore, that in order to give meaning to the 'other than his failure to tender periodic dues' clause of §8(b)(2), we must look to the

[8] *General Motors* and *Radio Officers, supra. See* NLRB v. Hershey Foods Corp., 513 F.2d 1083 (9th Cir. 1975).

> reason for denial of full membership, not the reason for denial of financial core membership.[9]

As the Second Circuit aptly noted, Local 1104's position "instead of accommodating the agency shop to the Act [as had been the case in *General Motors*], it twists the Act to accommodate this version of the agency shop."[10]

4. The Second Circuit correctly noted that under the union's position the reasons for denial of full membership become irrelevant, leading to the incongruous result that the agency shop would be a stronger form of union security than the heretofore much preferred union shop provision. Although Local 1104 states at page 20 of the petition that this is not the case, careful examination of its position reveals that in practical effect it is.

The "concession" that Local 1104 is prepared to make — *i.e.*, that a demand for dues following a denial of membership which itself constitutes an unfair labor practice would violate 8(b)(2) — is illusory. If the denial of membership itself constitutes an unfair labor practice, then the union must admit the individual as a member, and the individual will then have an obligation to pay dues. Unless and until true or full membership is available, there can be no obligation to pay dues or initiation fees.

5. The Second Circuit correctly observed that its decision avoided the problems of compulsory unionism which Congress attempted to cure. The union shop authorized by the Taft-Hartley amendments was an accommodation:

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[9] PA 15a (footnote omitted).

[10] *Id.*

The evils of compulsory unionism were eliminated, but protection was afforded unions against free riders. To insure that some of the compulsory unionism evils did not creep back into practice, Congress restricted employers and unions from taking any job-related action against an employee who was a union member but lost that membership for any reason other than failure to tender dues. The legislative history is unequivocally clear that this single ground alone — failure to tender dues "as a condition of acquiring or retaining membership" — could provide the basis for seeking the discharge of an employee. Rigby tendered his dues, but they were rejected. He was denied membership not for failure to pay dues, but because he had engaged in protected section 7 activity on behalf of another labor organization at a time when he was not a member of any union and was not required to be a member of any union. The union, therefore, no matter how much camouflage it uses, is seeking the discharge of Rigby for his having engaged in protected section 7 activity. The denial of membership to accomplish this goal is clearly a throwback to the closed-shop days.

Once again, the Second Circuit's decision is very well reasoned and comports with the previous guidance of this Court in related cases. It is clearly correct and should not be reviewed by this Court.

II

There is No Conflict of Decision

The issue in this case is one of first impression. It is ironic that the union advances the position last put before this Court in an effort to defeat the legality of the agency

shop. It is submitted that if the Court had entertained the issue in the *General Motors* case it would have found it to be fatal to the union's contention in that case. The Second Circuit's opinion is cogently reasoned and in line with this Court's prior decisions. The issue has never been decided in any other circuit, and, inasmuch as the Second Circuit's decision is clearly correct, it should be left unreviewed.

CONCLUSION

The union's efforts in this case are nothing less than an attempt to impose taxation without representation, an issue decided some 200 years ago by our founding fathers. It is almost unthinkable that the spokesman for the working man, organized labor, petitions this Court to sanction such activity on the eve of our nation's bicentennial.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

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Respectfully submitted,

RAINS, POGREBIN & SCHER
Counsel for Respondent Rigby
210 Old Country Road
Mineola, New York 11501
516-742-1470

FREDERICK D. BRAID
Of Counsel